Supreme Court, U.S.
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In the
United States Supreme Court

Mark A. Adams, Pro Se
Plaintiff-Appellant,

V

City of Auburn, In,
Defendant-Appellee.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

Petition for Writ of Certiorari

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Question Presented

Whether exercising visitation by a Father is a fundamental right within the meaning of the 1st, 5th, 9th, and the 14th Amendments? And whether the opinion of the Seventh Circuit Court of Appeals conflicts with opinions in Quillion v Walcott, 434 US 426 (1976), Stanley v Illinois, 405 US 656 (1972), and Mabra v Schmidt, 356 F. Supp 620 (1973)?

Parties to the Proceeding

Petitioner is Mark A. Adams, who is a father who's parental rights were denied in the United States District Court and the Seventh Circuit Court of Appeals.

Respondent is the City of Auburn, In which was the Respondent in the United States District Court and the Seventh Circuit Court of Appeals

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Petition for Writ of Certiorari

Petitioner respectfully petitions for a writ of Certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Opinions Below

The Seventh Circuit opinion is an unpublished opinion of the Seventh Circuit Court of Appeals, case number 01-3875. The district court opinion was entered on October 18, 2001.

Jurisdictional Statement

This is on appeal from a judgment of Summary Disrnissal entered on 18 October 2001 by Judge Roger B. Cosbey, Magistrate Judge, U.S. District. The Notice of Appeal was filed on 24 October 2001.
The District Court had jurisdiction under 42 USC 1983, and this Court has jurisdiction of this appeal by virtue of 28 USC 1254(1)

Question Presented

Whether exercising visitation by a Father is a fundamental right within the meaning of the 1st, 5th, 9th, and the 14th Amendments? And whether the opinion of the Seventh Circuit Court of Appeals conflicts with opinions in Quillion v Walcott, 434 US 426 (1976), Stanley v Illinois, 405 US 656 (1972), and Mabra v Schmidt, 356 F. Supp 620 (1973)?

Reasons for Granting Certiorari

1. Whether the Constitution places any restrictions on the rights of a divorced father
2. The importance of this issue has been widely recognized including by this court
3. When confronted with the issue of a Father's Parental Rights, the lower courts having reached varied results.
4. The lower courts reached a wrong decision by ignoring common law.
5. This case offers a particular suitable vehicle for resolving this important issue.

Statement of the Case

This case presents the question of whether a father's right to the care and companionship stops after the father is divorced. Federal courts have resolved several types of issues dealing with visitation. In Franz v US, 707 F 2d 582 (1983), Judge Bork said that in certain situations visitation is a fundamental right. But Judge Bork stopped short of declaring regular visitation a fundamental right- Another case concerns whether a prison must allow for visitation for a father and his son. In this case, visitation was declared a fundamental right. Two other cases concerning visitation concerned if a parent may keep a child beyond the limits in a court order. In each of these cases, the Justices involved declared that since the time lost was insignificant, then there is not constitutional violation. See Wise v Bravo, 666 F2d 1328 (1981) and Zakrzewski v Fox, 87F3d 1011, 1014(1996).

The Facts

On September 23, 2000 the plaintiff arrived at his ex-wife's home to pickup his child for the plaintiff's birthday party. The plaintiff's ex-wife refused. The refusal was based on the grounds that the plaintiff's birthday was actually not until the next day, the 24th of September and the plaintiff was going to the Formula One race at the Indianapolis Speedway that day. The plaintiff called the Auburn police when she refused. When the officer arrived, the plaintiff showed the officer the section of the visitation that gave the plaintiff visitation for family functions. The officer refused to enforce the order on two grounds. The first being that this was a civil matter and on the second that the order did not specifically list out birthdays. The Plaintiffs ex-wife had asked [on Sept. 14,00] the plaintiff if he would take Lucas, their son on her weekend (Sept. 23-24,200) due to her plans for the weekend. She was informed that the plaintiffs father was trying to get tickets to the race, but the plaintiff was willing to work something out, especially since it was going to be the plaintiff's birthday that weekend. On Sept. 21, 00, the plaintiff and his ex-wife discussed the visitation for the upcoming weekend. She refused to agree to the visitation for the party. And stated that she would only follow the order exactly and not allow me any more extra time. On Tuesday, September 27, 00 the plaintiff went to go pickup Lucas for their midweek visitation. This was per their previous conversation. The order states that if no agreement can be reached for midweek visitation then the midweek visitation will begin on Tuesday. The plaintiff arrived at the plaintiff's ex-wife's home to pickup Lucas for visitation. She was not at home. The plaintiff went to

his ex-in-laws to see if Lucas was there. Lucas and his mother were there. Lucas' mother again refused visitation. This time the refusal was the grounds that the plaintiff had not given her 24 hours notice and had no clothes for him. Again the plaintiff called the Auburn Police Department. The plaintiff showed the officers the visitation order. Again the officers refused to enforce the order on the grounds that this was a civil matter and they did not nave the power to enforce it. The plaintiff's ex-wife agreed to let the plaintiff have visitation the next day. The following day the plaintiff arrived to pickup Lucas. Before allowing the plaintiff to take Lucas, the plaintiff s ex-wife requested a list of phone numbers of the plaintiff's family members. To which the plaintiff argued due to the fact that he had given them to her several other times. The plaintiff relented and gave the numbers to her. Next she would not allow visitation on the grounds that the plaintiff wanted overnight visitation as stated in the order. For the third time, the plaintiff called the Auburn Police Department. The plaintiff showed the officers the visitation order. Lucas's mother told the officer to leave until they received a warrant. While Officer Weicht was trying to talk to Lucas' mother. Officer McCarty asked me if Lucas wanted to come with me. Officer Weicht informed me that the only way that Lucas' mother was going to let me have visitation that day was if I would bring him back that night instead of in the morning. The plaintiff agreed because his son was standing at the door waiting for him. On January 5, 01, the plaintiff s ex-wife agreed that the midweek visitation was to be from 4:00 PM Tuesday to 9:00 AM Wednesday.

Reasons for Granting Certiorari

Whether the Constitution places any restrictions on the rights of a divorced father?

This court has held that a divorced father may not be treated differently from a married father living with his children. See Quillion v Walcott, 434 US 246 (1976). The only limits that are imposed are those that have to do with the divorced. I must ensure that my ex-wife is allowed to spend the necessary time with our son also. The importance has been heightened by divergent rulings reached by the lower courts.

The Importance of Parental Rights have been widely recognized including by this Court

There is wide spread recognition that the question presented here is an important issue of national law. Disparate entities and groups have made this clear; this Court in Quillion v Walcott and individual members of the Court in other cases; respected legal commentators. And finally, the issue is particularly important to the average American citizen.

Individual members of this Court have recognized the importance of parental rights. And the necessity of a parent's need to associate with his children. In Quillion, the court said that a divorced father can be treated differently from a married father living with his children. This Court noted that a parent's right to the companionship, care, custody, and management of his children is an interest far more precious man any property rights in May v

Anderson, 345 US 528, 533 (1952).

The importance of this case goes beyond this Court. Lower courts have ruled the importance of parental rights. These include Roe v Irwin, 441 F. Supp 1247 (1985), Mabra v Schmidt, 356 F. Supp 620 (1973), In Re: J.S. And C., 324 A 2d 90;
Supra 129 NJ Super at 489, Carson v Elrod, 411 F. Supp 645, 649 DC E.D. Va (1976), Armstrong v Manzo, 380 US 545 (1965), and Stanley v Illinois, 405 US 645 (1972). In each of these cases the care and companionship was declared a fundamental right guaranteed by the Constitution.

Finally, the question presented is extremely important to the average American. Most all divorced fathers will undergo some denial of visitation after a marriage is dismantled. Yet a divorced father can expect little if any help at all in getting visitation enforced. Whether visitation is a fundamental right impacts all divorced fathers.

When confronted with the issue of a Father's Parental Rights, the lower courts have reached varied results

Judge Cosbey of the US District Court of Northern Indiana-Fort Wayne Division said in his ruling that since my rights to visitation were limits by the visitation order, my right to visitation is just a privilege. If this is the case, then poll taxes and literacy tests are constitutional. They were limits on the right to vote. But since they are one, morally wrong and, two, unfair limits on a persons right to participate in our democracy, they are unconstitutional. By making my parental rights just a

privilege, on par with my right to drive a car, Judge Cosbey and the 7th Circuit violated the precept in Quillion v Walcott that a divorced father may be treated differently from a married father living with children. If a divorced father may not be allowed to ensure that he has visitation with his child, then all hope that a good and productive member of society will be raised will be lost.

But in Mabra v Schmidt, 356 F. Supp 620 (1973), Judge Doyle concluded "a father enjoys the right to associate with children; that this right is guaranteed by the First Amendment as incorporated in the Fourteenth; alternatively, that this right is embodied in the concept of liberty as that word is used in the due process clause of the Fourteenth Amendment; and that whatever the constitutional provision or provision by which it is protected, the right is fundamental." But as this Court surely realizes that visitation is the only way that a divorced father can associate with his children. But in Franz V US, Judge Bork refused to say that visitation was a fundamental right. In fact, Judge Bork said that visitation was a privilege.

The lower courts reached a wrong decision by ignoring common law

In Benton v Oakland City, the Indiana State Supreme Court has said that a city is liable under the theory of respondent superior when a private duty is owed to the individual. The private duty to me was to have the visitation order enforce when presented to them. By Indiana Code (1C 3 5-42-3 -4-b2), a person who deprives another person of visitation rights with a visitation is guilty of a class b

misdemeanor. In Judge Cosbey's decision for summary judgment, he said that he his court would have supplementary jurisdiction, but he refused on the grounds that part of my case was based on respondent superior. Section 1983 does not give an exception to the common laws of the state.

This case offers a particular suitable vehicle for resolving this important of Parent Rights

Finally, because this case arises out of a normal request for visitation, it is particularly appropriately for considering whether the 1st, 5th, 9th, and the 14th Amendments limits the rights of a divorced father. The straight forward facts of this case vary little from numerous requests to have visitation enforced on a daily basis. The fact that police in the State of Indiana have a duty to enforce visitation order makes this case all the more appropriate for consideration by this Court.

Conclusion

The District Court of Northern Indiana and 7th Court of Appeals ruled improperly in deciding that a divorced father's right to visitation is not a fundamental right. The defendants have failed to show a compelling reason why me parental rights were denied. Millions of divorced fathers expect that when a police officer is called to enforce a court order granting visitation, that it will done. Petitioner respectfully request that this Court grant his petition for Writ of Certiorari, and address the Constitutional limits on divorced fathers.

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Appendix

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Mark A. Adams,
Plaintiff

V CAUSE NO. 1.-01-CV-152

City of Auburn, In,
Defendant.

(Filed October 18, 2001)

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

This matter is before the Court[1] on the Motion for Summary Judgment filed by the sole-remaining Defendant, the City of Auburn, Indiana (hereafter "the City of Auburn" or "Defendant") on September 19, 2001. The Pro Se-Plaintiff, Mark Adams ("Adams"), filed his response, styled an "Answer to Motion for Summary Judgment" on September 20, 2001, and on October 4, 2001, the Defendant filed a reply. On October 10, 2001, Adams filed a "Surreply to the Motion for Summary Judgment," Thus, the motion for summary judgment is now ripe for review.[2] For the following reasons, the Defendant's Motion for Summary Judgment will be GRANTED, and to the extent Adams has asserted state law claims, they will be DISMISSED without prejudice.

II. PROCEDURAL AND FACTUAL BACKGROUND

During one week in September 2000,

Adams and his former wife got into a garden-variety spat over three attempts by Adams to exercise visitation with his three year old son, Lucas.[3] (Tr. at 2-3.) Apparently each time Adam's ex-wife denied visitation he tilled the Auburn, Indiana city police. When they failed to turn Lucas over to Adams, enforcing the divorce decree in Adams' view, he sued the City of Auburn, the United Slates of America and the Slate of Indiana in federal court for $750,000,000 and for a declaration that "the child custody, support, and visitation laws of the federal government and the state of Indiana [are] unconstitutional,"[4]

This case springs from a divorce decree that was apparently something less than a model of clarity,[5] What we know is that the decree gave Adams' ex-wife custody over Lucas, with Adams receiving some visitation, Apparently, Adams was to have mid-week overnight visitation provided that he and his ex-wife could agree on the date (hereinafter, "the agreement provision[11]). However, if they could not agree, Adams was to have overnight visitation on Tuesday nights (hereinafter, "the Tuesday provision"), "Overnight" probably meant that visitation was to occur from 4:00 p.m. until 9:00 a.m. the next morning, however because the decree contained a typographical error, the visitation was actually described as running only from 4:00 p.m. until 9:00 p.m.[6] The divorce decree also provided that special family situations, like weddings and funerals were to take precedence over usual visitation provisions (hereinafter, "the family situations provision').

Thus the decree set the stage for the flurry of visitation disputes that erupted during one week in September 2000. At some point, Adams and his ex-wife allegedly agreed that even though it

was not his scheduled weekend for visitation, Adams could take Lucas for a few hours on Saturday, September 23, 2000, for Adams' birthday party. However, when Adams attempted to pick up Lucas on Saturday, his ex-wife refused because it was not his actual birthday, Adams response was to call the City of Auburn police department, apparently expecting that they would enforce the visitation provisions of the divorce decree. However, when the police arrived, they refused to enforce the decree because the matter was a civil dispute and it was not Adams' birthday in any event. A few days later, on September 26, 2000, Adams attempted to pick up his son from his ex-wife under the Tuesday provision. However, his ex-wife refused visitation on the grounds that Adams had not given her 24 hour notice and because she had not prepared overnight clothes for Lucas, Adams again called the police. When the police arrived, Adams showed them the Tuesday provision of the decree and asked them to enforce his visitation rights; however, the officers again refused, stating that the dispute was a civil matter and they did not have the power to enforce the decree, Adams and his ex-wife then apparently agreed that Adams could have overnight visitation the following day, The next day, September 27,2000, Adams attempted to pick up Lucas under the agreement provision. However, his ex-wife refused to allow Adams visitation because he wanted overnight visitation and the literal terms of the decree (albeit because of the ostensible typo) only provided for visitation until 9:00 p.m. Adams again called the police. When the officers arrived, Adams relented and agreed to return his son that night.

Although Adams' long-winded complaint goes on for eleven (11) pages the only contention he makes against the City of Auburn is that it is

liable because its police officers were "negligent in their failure to enforce a visitation court order," or because they refused to enforce the decree, they otherwise failed "to do their duty' The City of Auburn contends in its motion that since no constitutional deprivation occurred as a matter of law, it is entitled to summary judgment.

III. SUMMARY JUDGMENT STANDARD

"Summary judgment is proper only if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Gonzalez v. Ingersoll Milling Machine Co.*, 133 F3d 1025, 1031 (7th Cir. 1998) (quoting Fed. R. Civ, P, 56©) While the moving party "always bears the initial responsibility of informing the district court, of the basis for its motion and identifying those portions of the record, if any, which it believes demonstrate the absence of a [genuine issue of] material fact, there is nothing in Rule 56 that requires a moving party to negate an essential element of an opponent's claim for which the opponent will bear the ultimate burden at trial" *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 168 (7th Cir. 199(5) (citing *Celotex Corp. v. Catrett*, 477 US. 3178, 323, 106 S. Ct. 2548, 2552-53 (1986)). Rather, the standard for granting summary judgment, which mirrors the "directed verdict" standard under Rule 50(a), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250, 3 06 S. Ct. 25Q5, 2511 (1986), requires the district court to grant summary judgment if the record before us "could not lead a rational trier of fact to

find for the non-moving party." *McClendon v, Indiana Sugary Inc.*, 108 F,3d 7S9, 796 (7th Cir. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp,*, 475 U.S. 574, 5S7, 106 S.Ct 1348, 1356 (1986)). The burden is therefore on the non-movant to set forth "specific facts showing that there is a genuine issue for trial," *Eiland v. Trinity Hosp.*, 150F.3d 747, 750 (7th Cir. 1998) (quoting Fed. R. Civ, P, 56(e)). "In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party," *Debs v. Northeastern Illinois Univ.*, 153 R3d 390, 394 (7th Cir. 1998) (citing *Anderson*, 477 U.S. at 255,106 S.Ct at 2513). Substantive law determines which facts are "material"; that is, those facts which might affect the outcome of the suit under the governing law, *McGinn v. Burlington Northern R.R*, Co., 102 F.3d 295,299 (7th Cir. 1996) (citing *Anderson*, 477 U.S. at 247, 106 S.Ct at 2509-10). The disputed factual issues must be "genuine," Fed. R. Civ. P. 56(c), and consequently a dispute over irrelevant or unnecessary facts—i.e., facts that do not affect the outcome of the suit under the governing law—does not preclude summary judgment. *Hardin* v. S.C. *Johnson & Sons, Inc.*, 167 F.3d 340, 344 (7th Cir. 1999).

The nonmoving party may not rest on the allegations of the pleadings in opposing a motion for summary judgment. Crim *v. Bd. Of Educ. of Cairo Sch. Disk No, 1,* 147 F.3d 535, 540 (7th Cir. 1998); Fed. R. Civ. P. 56(e). "Furthermore, a 'party needs more than a scintilla of evidence... to defeat summary judgment." *Adusumilli v. City of Chicago*, 164F.3d353,361 (7th Cir, 1998) (quoting *Senner* v. *NorthCentral Technical College*, 113 F.3d

750, 757 (7th Cir. 1997)); *see also Anderson*, 477 U.S. at 252,106 S.Ct. at 2512, Moreover, "neither 'the mere existence of some alleged factual dispute between the parties,' *Anderson*, 477 U.S. at 247,106 S.Ct. at 2505, nor the existence of 'some metaphysical doubt as to the material facts, *Matsushita Elec. Indus.*, 475 U.S. at 586, 106 S.Ct. at 1356, is sufficient to defeat a motion for summary judgment." *Teach v. County of Green Luke*, 157F.3d465, 471 (7th Cir. 1998). Thus, a summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.[1]" *Essex*, 111 F.3dat 1308 (quoting *Anderson*, 477 U.S. at 251-252, 106 S. Ct. at 2512).

IV. DISCUSSION

1. Section 1983 General Principles

Liberally construing the .pro *se* complaint, *Haines v. Kerner*, 404 U.S. 519 (1972), Adams seeks to assert a § 1983 cause of action against the City of Auburn because its police either negligently or intentionally failed to enforce a state court divorce decree and thus deprived him of his visitation rights. Of course, § 1983 is not a source of substantive rights but instead provides "a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 1148.0,807,811 (1994). To state a claim under § 1983, Adams must (1) allege facts that show that the defendant acted under color of state law, and (2) deprived him of a right secured by the Constitution or laws of the United States. *Gomez v.* Toledo, 446 U.S. 635, 640 (19SO); *Alvarado v Litscher*, 2001 WI 1159010, *2 (7th Cir 2001). It is the latter prong upon which we

largely focus here.

Moreover, while a municipality is a "person" within the meaning of § 19S3. it cannot be held liable under the doctrine of *respondent superior*. *See Monell v. Dep. ofSoc. Sews,* 436 U.S. 658,690-691, 98 S.Ct. 2018, 2035 (1978), *see also Bd of Comm'rs of Bryan Cty. v. Brown,* 520 U.S. 397,406-07, IJ7 S.Ct. 1382, 138y~90 (1997); *Eversole v. Steele,* 59 F.2d 710, 715 (7th Cir. 1995). Rather, a municipality can be liable under section 19S3 only for acts taken pursuant to its official "policy statement, ordinance, regulation or decision," or pursuant to a municipal "'custom' even though such a custom has not received formal approval" from the municipality. *Monell,* 436 U.S. at 3690-91; *see also Eversole* 59 f .3d at 715; *Scott* v. *Q'Grody,* 975 F.2d 366, 370 F.2 (7th Cir. 1992). Decisions since *Monell* have established that in certain circumstances, a municipality may be held liable under section 1983 for a single decision by a municipal policy maker, *Eversole,* 59 F.3d at 715 (citing *Pembaur v. Cincinnati,* 475 U.S, 469, 480 (1986)). All in all then, a municipality can violate section 1983 in three ways: an official policy, a less formal yet well-settled practice or custom, or the act of an official with the authority to make final municipal policy. *McTigue* v. *City of Chicago,* 60 F.3d 381, 382 (7th Cir. 1995); *Baxter by Baxter v. Vigo County School Corp., 26* F3d 728, 734-35 (7th Cir. 1994).

2. Adams has No Constitutional Claim

The principal point of contention is whether Adams, has alleged, let alone raised a material issue of fact regarding whether he suffered any deprivation of a federal right conferred by the Constitution or laws of the United States. In his

Complaint, and in his briefing, Adams cites to a number of cases which he contends establishes the principle that a father's visitation rights are constitutionally protected and therefore are actionable under section 19S3. However, while the cases cited by Adams involve a host of propositions, they all recognize in one fashion or another that the relationship between a parent and a child, and in particular the parent's fundamental right to the care and custody of his children, is constitutionally protected under the Equal Protection and Due Process clauses of the Fourteenth Amendment.

Stated simply, "'[p]arents have a fundamental "liberty interest" in the care, custody, and management of their children/" Zakrzewski v. Fox, 87 F.3d 1011,1013 (quoting Fitzgerald v. Williamson, 787 F.2d 403, 407 (8th Cir. 1986)); accord Ruffalo v, Civiletti, 702 F.2d 710, 715 (8th Cir. 1983); Santosky, 455 U.S. at 753. However, this right is not absolute, Zakrzewki, 87 K3d at 1013 (citing Mansano v. South Dakota Dep't of Soc. Servs., 60 F.3d 505, 510 (8th Cir, 1995)).

For example, in Wise v. Bravo, 666 F.2d 1328 (10th Cir, 1981), the husband brought a section 1983 cause of action against the police for a deprivation of his procedural due process rights guaranteed under the Fourteenth Amendment. Operating under a divorce decree that granted custody to his wife, the husband took his daughter for a visit after the wife demanded that he return the child "that night," Id. at 1330. When the husband refused to return the child, the wife secured the assistance of police officers who appeared at the husband's home, and the child was surrendered without protest. Upon review of the

District Court's grant of summary judgment in favor of the police, the Tenth Circuit held that the husband failed to demonstrate that he suffered any deprivation of any cognizable Due Process protection guaranteed him by the Fourteenth Amendment, Id. at 1333. In addition, the Tenth Circuit concluded that "any deprivation of [the plaintiffs] visitation rights was so insubstantial in duration and effect" that it failed to rise to a federal constitutional level.

A similar visitation dispute arose in Zakrzewski, after The non-custodial parent, the husband, sought to extend his visitation. See Zakrzewski 87 F.3d at 1013, When the ex-wife's attorney contacted the Sheriff, the Sheriff called the father and demanded that he either return the child or face felony charges. The father returned the child without incident.

The father sued the county and the various police officers under section 1983, but summary judgment, was granted by the District Court and ultimately affirmed by the Eighth Circuit, Notably, the Eighth Circuit recognized that while -visitation decisions might be subject to Due Process scrutiny, no case had ever found the right to visitation so infringed that it rose to the level of a constitutional violation.

The analysis employed in both Wise and Zakrzewski is instructive here. Essentially, Adams, like the fathers in both Wise and Zakrzewski, alleges that a liberty interest, the right to visit his son, was impeded by police authorities who failed to enforce the visitation order. However, this overlooks the proposition that his liberty interest had already been substantially reduced by the state court divorce decree and by Indiana law. See Zakrzewski 87 F.3d at 1014; Wise, 666 F 2d at 1332.

Nevertheless, we begin by assuming that Adams is seeking to articulate a substantive due process claim under the Fourteenth Amendment, However, it is difficult to describe in a concrete way the liberty interest that Adams contends was infringed by the state actors that would in any way rise to the level of substantive due process protection. For example, while the due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests" the Supreme Court has been reluctant to expand the concept because to do so would "to a great extent, place the matter outside the arena of public debate and legislative action." Washington v. Glucksberg, 521 U.S. 702, 719-20, 117 S. Ct. 2258, 2267-68 (1997). Indeed, as noted earlier, any "fundamental liberty interest" Adams has, has already undergone some erosion under the terms of the divorce decree and Indiana law, and therefore it is unlikely that any proper application of the substantive due process analysis would ever truly suggest that his liberty interest was "fundamental,"

Nevertheless, it would appear that the precise liberty interest at issue here that Adams seeks to defend is the right to be free from state officials tortiously interfering with his visitation rights with his son. However, Adams fails to show why he does not have an adequate state law tort claim such that his constitutional claim is simply redundant. See Khan v. Gallitano, 180 F.3d 829, 835 (7th Cir, 1999), Moreover, even if we assume arguendo that such a liberty interest exists, any deprivation was so insubstantial in duration and effect (hat it failed to rise to a federal constitutional level. See Zakrzewski, #7 F.3d at 1015; Wise, 666 F.2d at 1333.

If Adams is contending that he was denied procedural due process he also has no claim for the additional reason that there- exists an adequate state court remedy. Zakrzewski, 87 F.3d at 1014 (citing Parratt v Taylor, 451 U.S. 521, 101 S. Ct 190S (1981)). Indeed, Indiana law provides a remedy for a custodial parent's interference with a non-custodial parent's visitation rights through such means as injunctive relief contempt. See IND. CODE § 37-17-4-4 (injunction); IND. CODE § 31-17-4-8 (contempt); e.g., Zakrzewski 87 F.3d at 1014. In fact, after the incident here, Adams invoked at least one available state court remedy by pursuing contempt against his wife, and there is no allegation that the City of Auburn attempted to prevent him from doing so. Id.

Finally, to the extent that Adams is arguing that there was an equal protection violation, it too fails. Adams does not claim that he was treated differently than others because he is a member of any particular group or classification, nor even that he was treated differently than others similarly situated. In short, Adams equal protection claim is devoid of facts la support an essential element and therefore is subject lo summary judgment. Offutt v, Kaplan, 884 F. Supp. 1179, 1188 (N,D, 111. 1995).

Finally, Adams rather imprecisely contends that the visitation rights conferred by the divorce decree were themselves actionable rights under section 1983. However, this contention fails to identify any requisite federal substantive basis for a section 1983 suit. In other words, the visitation rights that Adams seeks to enforce were conferred by IND. Code § 31-17-4-1 not any federal source. See White v. Olig, 56 F.3d 817, 820 (7th Cir. 1995) ("It is . . . a truism, reiterated many times by this court, that mere allegations of state law infraction are insufficient to

support a Section 1983 claim.").

Therefore, in granting Adams the benefit of every inference, we still find no facts that rise to the level of a constitutional deprivation and therefore his § 1983 claim fails. However, to complete the record we will also address another deficiency in Adams' claim.

3. Adams Fails to Establish that the Alleged Deprivation Was Caused by a Municipal Policy, Practice Of Custom.

While Adams has failed to show any § 1983 deprivation, we also note that he has not established any municipal liability as well. Indeed, because Adams brings this suit against the City of Auburn in its official capacity, he must allege facts that, if true, would show that a policy or custom of the City of Auburn led to the deprivation. Leahy v. Bd. of Trustees of Community College Dist. No. 508, 912 F.2d 917, 922 (7th Cir. 1990).

Here, Adams simply fails to allege any facts that even, remotely suggest that the police officers were acting pursuant to a municipal policy or custom, and he makes no effort to show that any of them had final policy making authority. See Tidik v. Ritsema, 93S F. Supp. 416, 424 (E.D. Mich. 1996) (repealed police responses to calls for assistance surrounding visitation disputes does not constitute a municipal policy or custom). Indeed, Adams' complaint against the City of Auburn seems to rely upon respondent superior, a theory of municipal liability that has squarely been rejected in the context of § 1983- See e.g., Davis v. Zirkelback, 149 F.3d 614, 619 (7th Cir. 1998) (citing Monell, 436 U.S. 690-91). Although Adams docs argue that a police officer told him that they do not enforce civil visitation orders, he fails to show that this was either a municipal policy or that it caused a constitutional deprivation in this

instance.

4. The Possible State Law Claims

Finally, while we are not sure that Adams has asserted any state law claims, to the extent that he has, we would have supplemental jurisdiction; however, since summary judgment is being granted with respect to the federal claim, we decline to exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3). Accordingly, any state law claims will be dismissed without prejudice.

V. Conclusion

For the reasons herein stated, the City of Auburn's motion for Summary Judgment is granted. To the extent that Adams has pled any state law claims, they are herby dismissed without prejudice.

Entered this 18th day of October, 2001

BEST AVAILABLE COPY

In the United States Court of Appeals
For the Seventh Circuit

No. 01-3875

Mark A. Adams,

Plaintiff-Appellant

versus

City of Auburn

Defendant-Appellee

Appeal from the United States District Court

For the Northern District of Indiana, Fort Wayne Division

(Filed March 25, 2002)

Before Bauer, Kanne, Wood, Circuit Judges

Mark Adams sued the City of Auburn, Indiana, under 42 U,S.C- § 1983, alleging that city police officers refused to enforce a visitation order entered as part of his divorce decree and thereby deprived him of his right to associate with

his son. A magistrate judge, presiding by consent under 28 U.S.C. § 636(c), granted judgment for the city, and Adams appeals.

The parties did not present any evidence outside the complaint in the district court, and without contesting Adams's version of events, the city moved for judgment as a matter of law. In his complaint Adams alleges that during one week in September 2000 he three times called the police because he and his ex-wife could not agree on visitation. According to Adams, lit- unsuccessfully sought to pick up his son on September 23 for a birthday party and both September 26 and September 27 for scheduled visits, Adams asserts that he called police all three times after his ex-wife refused to produce their son and showed the visitation order authorizing the requested visits to the responding officers. Each time, however, the officers refused to do anything, telling Adams that it was "a civil matter" and that they had no power to enforce the visitation order.

According to Adams, the city deprived him of his right to exercise "care, custody, and control" over his son, *see Troxel v. Granville*, 530 U.S. 57, 66 (2000), by directing its police department not to enforce visitation orders. Adams's argument is doomed, however, not only because federal courts typically do not adjudicate domestic relations disputes, *see Allen v. Allen*, 48 F.3d 259, 261-62 (7th Cir. 1995), but also because as a rule the Constitution does not obligate municipalities to protect their citizens from one another, see *DeShaney v.*

Winnebago County Dep't of Social Servs, 489 U.S. 189, 196-200 (1989); *Archie v. City of Racine,* 847 F.2d 1211, 1220-23 (7th Cir, 1988) (en bane). Here it was Adams's ex-wife, not the police officers or the city, who refused to turn over Adams's son; believing that his ex-wife violated the visitation order, Adams should have returned to the court that issued the order to have it enforced. *See* Ind Code § 31-1.7-4-4 (authorizing injunctive relief); *id.* § 31-17-4-8 (authorizing contempt proceedings); *Williamson v. Creamer,* 722 N,E.2d 863, S6G (Ind. Ct. App. 2000). Adams does not assert that the officers who responded to his call facilitated his ex-wife's obduracy by taking her side in the dispute, see *Johnson v. City of Evanston,* 250 F.3d 500, 562-63 (2001), and absent interference by the police, or a policy of discriminatory noninterference by the city, *sec DeShaniey,* 489 U.S. at 197 n.3—neither of which is alleged—Adams has failed to state a claim.

Moreover, even if the responding officers had sided with Adams's ex-wife, it is still doubtful, given the small amount of lost visitation time, that a constitutional violation would exist. As the magistrate judge observed, two courts have held that slight official interference with a non-custodial father's visitation rights does not cause constitutional injury. See *Zakrzewski v. Fox,* 87 F.3d 1011, 1014 (8th Cir. 1996); *Wise v. Bravo, 666* F,2d 1328, 1333 (10th Cir, 1981). But we need not explore the effect of these decisions, for Adams has not alleged official interference in the first

place, and nondiscriminatory inaction by the city and its police does not afford him a basis for relief.

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 6 2003
OFFICE OF THE CLERK

NO. 02-1342

In The

Supreme Court of the United States

MARK A. ADAMS,

Petitioner,

v.

CITY OF AUBURN,

Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether no cause of action for interference with visitation rights by an ex-spouse exists under 42 U. S. C. § 1983 where it was Adams' ex-wife, not the police officers of the City of Auburn, who refused to turn over Adams' son, and where Adams did not allege any interference, policy of discriminatory non-interference, or other unconstitutional acts or omissions on the part of the City of Auburn.

PARTIES TO THE PROCEEDING

Petitioner is Mark A. Adams.

Respondent is City of Auburn, Indiana.

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STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner Mark A. Adams filed his Petition for Writ Certiorari following the entry of summary judgment in the United States District Court, Northern District of Indiana, on October 18, 2001. The Seventh Circuit Court of Appeals affirmed the District Court's summary judgment by Order of March 25, 2002. On April 24, 2002, the United States Court of Appeals for the Seventh Circuit denied Adams' Petition for Rehearing and Petition for Rehearing Enbanc.

STATEMENT OF THE CASE

The Plaintiff, Mark Adams, brought this action against the City of Auburn for the failure of the City of Auburn Police Department to enforce a visitation order. Adams alleged that on September 23, 2000 his ex-wife refused his visitation rights with his son for Adams' birthday because Adams' actual birthday was the next day. The custody agreement between Adams and his ex-wife allows visitation on family occasions such as funerals or weddings of close family members to take precedence over the visitation guidelines. Adams called the City of Auburn Police Department, but the police officers refused to enforce the visitation order because birthdays are not specifically listed in the custody agreement.

The following Tuesday, Adams' ex-wife refused to let him have visitation with his son because he did not give her twenty-four hours notice, even though their agreement does not require twenty-four hours notice. Adams again called the City of Auburn's Police Department which refused to enforce the visitation order.

The next day, Adams, once again, went to pick up his son for visitation. This time, Adams' ex-wife refused to let him have visitation with his son because he said that he would take his son to daycare that morning. Again, Adams called the City of Auburn Police Department and was told that the visitation order would only be enforced if he agreed to bring his son back that night.

Adams filed suit and alleged that the Police Department of the City of Auburn refused to do their duty when they refused to enforce a Court order. Adams further alleged that the Auburn Police Department failed to uphold the law when it refused to enforce the visitation decree. Adams sought damages pursuant to 42 U.S.C. § 1983.

The United States District Court, Northern District of Indiana, in ruling on City of Auburn's Motion for Summary Judgment, correctly distilled Adams' Complaint to the contention that City of Auburn is liable because its police officers were "negligent in their failure to enforce a visitation court order" or because they refused to enforce the decree, they otherwise failed "to do their duty". The District Court found that no facts rose to the level of a constitutional deprivation and that Adams had an adequate State Court remedy and did not have any requisite federal substantive basis for a Section 1983 lawsuit. The District Court further held that Adams had not alleged any facts to even remotely suggest that the City of Auburn police officers were acting pursuant to a municipal policy or custom.

The United States Court of Appeals for the Seventh Circuit affirmed. The Seventh

Circuit Court held that Adams did not allege official interference with his visitation rights by the police officers, and held that non-discriminatory inaction by the City and its police force does not afford a basis for relief under Section 1983.

REASONS FOR DENYING THE WRIT

I.

The Seventh Circuit Court Correctly Affirmed Summary Judgment Because No Cause of Action For Interference With Visitation Rights Exists Under 42 U.S.C. Section 1983 And Adams Has An Adequate State Law Remedy.

To state a claim for relief under § 1983, a plaintiff must demonstrate that he was deprived of a right secured by the Constitution or laws of the United States and that any such deprivation was achieved under color of law. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1975). Section 1983 does not, standing alone, create any equal or civil rights of citizens; rather, it provides a remedy for rights guaranteed by the Constitution or laws of the United States. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 905, 60 L.Ed.2d 508 (1979).

Adams filed his claim alleging that the City of Auburn is liable for damages to him under § 1983 for interference with his visitation rights. However, as noted by the courts below, no such cause of action exists. Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981).

In Wise, the plaintiff's wife was given custody rights to the plaintiff's daughter. The plaintiff took his daughter for an extended visit following an oral agreement with his ex-wife. While their daughter was with the plaintiff, the plaintiff's ex-wife telephoned and told the plaintiff that she wanted their daughter back that night. The plaintiff refused. Thereafter, the plaintiff's ex-wife called the police, who arrived at the plaintiff's apartment and took the daughter back to the plaintiff's ex-wife.

The Wise plaintiff filed suit against the police officers claiming damages pursuant to 42 U.S.C. § 1983 for interference with his visitation rights. The court stated that numerous federal decisions have, in the Fourteenth Amendment context, recognized that the relationship between parent and child is constitutionally protected. Wise, 666 F.2d at 1331. Furthermore, the court stated that these federal decisions, to be sure, recognize the important, fundamental interests involved. Wise, 666 F.2d at 1332. However, the court held that there is no substantive federal constitutional, statutory or common law governing family

relationships, including matters of custody and visitation rights between parents and children.

Accordingly, the Wise court found that the plaintiff had failed to allege or demonstrate that he had suffered any cognizable due process of law protection guaranteed him by the Fourteenth Amendment. Wise, 666 F.2d at 1333. The Wise court held that there was no § 1983 deprivation and further stated that § 1983 should not be viewed as a vehicle to resolve a dispute involving visitation rights - privileges. Wise, 666 F.2d at 1333. According to the Wise court, such a dispute is a subject uniquely reserved to the state court system; any claim for relief that the Wise plaintiff may have had existed under Colorado law and in the Colorado state system. Wise, 666 F.2d at 1333.

In Indiana, the ordinary method of enforcing visitation privileges is by means of contempt proceedings. Clark v. Clark, 404 N.E.2d 23, 37 (Ind. Ct. App. 1980). If there is an order or decree commanding an individual either to do or to refrain from doing something, that person can be punished for being in contempt of the court's order. Clark, 404 N.E.2d at 37. See generally, Piercey v. Piercey, 727 N.E.2d 26 (Ind. Ct. App. 2000); Williamson v. Creamer, 722 N.E.2d 863 (Ind. Ct. App. 2000); Hartzell v. Norman T.L., 620 N.E.2d 1292 (Ind. Ct. App. 1994). The court's power to arrest for contempt is not to be considered as a method of punishment, but as merely a means of securing compliance with its own order. Clark, 404 N.E.2d at 38. As in Wise, Adams' appropriate course of action was to file a contempt citation with the Court which entered the visitation order and ask that Court to find his ex-wife in contempt of that Court's visitation order.

Judge Cosbey correctly found below that Adams' liberty interest in visitation is not absolute and that Adams clearly had an adequate state law remedy for his ex-wife's interference with visitation rights. Adams is asking the Court to resolve a visitation dispute with his ex-wife via his § 1983 claim. As was held in Wise, such a claim is a subject uniquely reserved to the Indiana court system. Adams did not suffer a § 1983 deprivation.

II.

Adams' Claim Is Based Solely On A *Respondeat Superior* Theory And There Are No Allegations Of Any Municipal Policy Or Custom That Caused A Constitutional Deprivation.

1. A constitutional violation must have occurred for a governmental entity to be liable under § 1983.

Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or

executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The critical inquiry on the question of whether the City of Auburn is liable to Adams under § 1983 is whether a constitutional deprivation occurred. The case law has identified three instances in which a municipality can be said to have violated the civil rights of a person because of its policy:

> "1) an express policy that, when enforced, *causes a constitutional deprivation*,
> 2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a customary usage with the force of law, or
> 3) an allegation that the *constitutional injury* was caused by a person with final policy making authority." Baxter v. Vigo County School Corp., 26 F.3d 728, 734 (7th Cir. 1994). (Emphasis added.)

Clearly, in order for the City of Auburn to be liable to Adams under § 1983, a constitutional violation must have occurred. Monell, 436 U.S. at 690; Baxter, 26 F.3d at 734.

2. No constitutional violation has occurred in this matter.

As was discussed in Wise, *supra*, § 1983 is not a proper vehicle to resolve a dispute involving visitation rights - privileges. Wise, 666 F.2d at 1333. The District Court here correctly held that there is no substantive federal constitutional, statutory or common law governing family relationships, including matters of custody and visitation rights between parents and children. Wise, 666 F.2d at 1332. As was the case in Wise, Adams has not had his constitutional rights violated. Note that Adams did not sue the police officers who responded to his telephone calls, and, accordingly, Adams could only recover from the City of Auburn for a constitutional violation due to a policy or custom. A municipality cannot be held liable under § 1983 on a *respondeat superior* theory. Monell, 436 U.S. at 691. See also, Baxter, 26 F.3d at 734 (*respondeat superior* liability on the part of a local governmental unit is barred). Municipalities are answerable only for their own decisions and policies; they are not vicariously liable for the constitutional torts of their agents. Eversole v. Steele, 59 F.3d 710, 715 (7th Cir. 1995). Accordingly, the district court properly found that the City of auburn could not be held liable for the actions of its police officers under a theory of *respondeat superior*.

As noted by the court below, Adams has not even alleged that any policy or custom

was at work on the part of the City of Auburn to cause an alleged deprivation. The District Court correctly found that there were no facts that rise to the level of a constitutional deprivation and that Adams' § 1983 claim therefore failed. Accordingly, the Petition for Writ of Certiorari should be denied. There are no compelling reasons for granting Adams' Petition for Writ of Certiorari. There is no federal question involved and no conflict among decisions between courts that require involvement by the Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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